



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

# THE AMERICAN LAW REGISTER AND REVIEW.

---

---

VOL. { 45 O. S.  
36 N. S. }

JUNE, 1897.

No. 6.

---

---

## INTERNATIONAL LAW.\*

It may not be inappropriate,—it is certainly encouraging—to preface the discussion of legal subjects by the payment of tribute to the greatness and glory of our common profession. Here, at least, we shall all agree, differing perhaps from a considerable portion of the human race in our estimate, but asking for no better evidence of its exceeding usefulness than the denunciation and ridicule which have been showered upon it from immemorial time. Great wits and small ones have honored our calling by their malice and shown its strength by the innocuous results that followed the discharge of their noisy, but harmless artillery. Great kings have found that they could subdue armies, fetter the press, and dazzle the world by their exploits, yet fail to conquer the Bar. Napoleon himself, the Titan of modern times, was helpless before it, and failed to cajole, or terrify it into silence. He could make decrees from Berlin and from Moscow, and direct the passage of such laws as he deemed wise to have enacted, but in the end, it was the lawyer who interpreted those laws and construed those decrees. For the Law is the spiritual monitor and guide of nations, nay, the spiritual life itself: her ministers, however

\*Address delivered before the alumni and students of the Law Department of the University of Pennsylvania.

unworthy, cannot but represent some of her majesty. The Law is the concrete expression of Justice, the great ligament that holds communities together; the Advocate is her mouth-piece and interpreter. His the function to keep alive the fires of human liberty, and as he succeeds or fails in this so shall the honor of the bar rise or fall. The Law is the antithesis of Force, they cannot co-exist on equal terms. Force may triumph for a day, but only for a day. As with the passing centuries, the world grows wise, it learns the lesson more deeply, that Force is the most expensive and most costly, the most uncertain of expedients for righting a wrong. The poet-philosopher of the Augustan age boasted as one of the titles to glory of his imperial master, that the Forum was free from law suits. A golden age, indeed, if the absence of litigation really meant that men honestly performed their obligations without coercion ; a happy state, the existence of which we may well doubt. Perhaps the knowledge that Courts did exist, which were opened to the oppressed and injured, might account for this phenomenon ; perhaps stagnation in the lawyers' business meant that the general activities and enterprise were paralyzed by war and the pursuit of glory : perhaps, too, the poet exaggerated, as poets sometimes will. We must remember that the Bar of that day resembled only in name the Bar of to-day. Justice, with bandaged eyes holding the impartial scales with firm and steady hand, stands as our emblem. Apollo, flaying Marsyas who had dared to compete with him in performance on the flute, stood in front of the Roman Rostrum, a ghastly spectacle, indeed ; but whether a warning to the client or his counsel History does not tell. Even this cruel operation could not cure the flute player of his love for art, nor rob him of his gifts. At least, tradition says that after it had been performed, and the hapless artist bereft of his natural covering, the latter was turned into a bag, and when filled with air gave out sweet sounds if moved by the musical waves of a melodious flute. Thus did the victim against lawless violence protest, and as far as might be discourse in favor of the Liberty of Speech.

The history of a free people is the history of its Bar. No

nation, at least in modern times, has ever achieved its freedom without the aid of the Advocate. With us this is a truism, and needs no demonstration. From the earliest days we find our brethren in season and out of season, at the risk of life and liberty using their gifts in favor of freedom and against oppression. While we note with regret that the greatest of our national heroes, Washington himself, had not been provided with a legal education, it is to his credit that he surrounded himself with eminent lawyers, such men as Jefferson, Hamilton, Adams, and took their counsel. With these men to guide him, personal knowledge of the law was scarcely necessary. He was able to act judicially, and, as often happens with good and honest judges, the abundance of learning in the counsel, supplemented any lack of learning in the Court itself.

That there is nothing in legal training to unfit the Advocate for sterner duties in the field, a roll of honorable names, conspicuous in war and peace alike, is with us to prove: the truth is shown in our history that patriotism and devotion are not enfeebled by the pursuit and mastery of legal studies. *Cedunt arma togae* is not more true than the converse of the proposition. The same men have dropped or taken up the toga or the sword as the necessities of the nation demanded; they have promoted the arts of peace, and have stood out as the leaders in the conflicts of war, eminent and great in both alike.

But it is especially in our own day that the usefulness of the Bar has been conspicuous and important. The close relations of different nations have removed ancient prejudices and quickened latent sympathies into vigorous life. War has become less frequent, not only, I might say not so much, because of the growing regard for human life and impatience of human suffering, but because of the commercial spirit that has taught men to calculate the cost of armed conflicts. Few nations can afford to spend the money necessary for the outfit of an army. It was easy enough and cheap enough to send one hundred thousand men into the field so long as they could use the muskets that their fathers had used, or the spears

and swords that were deadly enough but inexpensive. When, however, the changing fortunes and feverish competitions of rival nations require endless novelty in guns, fortifications, methods of transportation, of attack and of defense, greater care for the injured, better food for those who do the fighting and less freedom in dealing with the property of non-combatants, a new order of things arises. The perplexities of Rulers serve to keep the Temple of Janus closed. Homicide becomes absurdly expensive. Glory loses prestige as the cost and risk rise to unheard of proportions. Personal prowess hesitates when rifles kill at 6,000 yards, strong towns lose their confidence when Krupp guns thunder destruction before they are in sight and treat ancient defenses with brutal and ruinous contempt. The Banker in Lombard or Wall street raises his voice and threatens to cut off the needed supplies, while the degenerate combatant prefers the farm or the workshop to the hazards and discomforts of a campaign in midwinter. The instinct of destruction is still present, for men are still human, the temptation to invoke the *ultima ratio* of kings still agitates the breast of rulers, but fear of results is as potent as the love of peace. They arm millions of men to show that they are ready for war, while year after year they proclaim their pacific purposes, and their readiness to enforce these purposes at the cannon's mouth.

There is, indeed, no more instructive and edifying spectacle than this long-continued abstinence from war when so many are ready to accept it, if only some one of the parties will throw down the gauntlet. Fermentation thus indefinitely protracted without explosion is a novel and cheering spectacle which must fill the world with amazement and the Bar with pride.

For, it must be remembered, the self-denial of Emperors and Kings does not remove the causes of irritation which once required blood-letting in nations as in persons. Differences will inevitably arise. The ambition of the strong is not dead, the sharp line between right and wrong is not more manifest to-day than in the past. Weak nations are as apt as ever to offend by their aggravating debility, while territorial

expansion appeals with ever-increasing eloquence to great and small. The rush to Africa and the eager haste of the Powers to seize a share of the Dark Continent without a dangerous fillip to the susceptibilities of rivals is an illustration of this. The old countries are being sorely crowded. America objects to being partitioned, and the chief of American nations does not hesitate to file a *lis-pendens* on the hemisphere. A war between any two powers might involve the world in a destructive conflagration wherein old landmarks might be obliterated and venerable constitutions shrivelled up like a scroll before the fire. How, then, shall the world settle its quarrels and contentions, save by calling the lawyers to talk the matter over, and to arrange affairs according to the principles of "natural justice?" True, no man has yet been found who could, or at least would, accurately define what these principles are, where they begin, and where they end, what their origin, and how they sprang into life or grew into recognition. Their starting-point is a mystery, their development, if they be what they claim, is a misnomer. But, fortunately for the world, a shibboleth need not be intelligible: perhaps, it commands respect in the inverse ratio to its intelligibility. Its plasticity recommends it to those who might refuse their acceptance if all agreed as to its meaning. Even to-day, although International Law, so called, has reached the high water-mark of fashion and popularity, who will venture a definition? Is it a science at all, is it in any sense a law, or a system? How can that be a law which finds no place for a superior or an inferior, which recognizes no sanction, submits to no tribunal, and shows itself in the critical periods of Modern History to have been little more than a harmonious setting to modern music of excellent rules which are easily misunderstood, more easily evaded and most easily perverted to base uses.

The eminent Lord Chief Justice of England has within the year added his own definition to the many which had heretofore been presented as solving the problem. Lord Russell says that "International Law is nothing more nor less than what civilized nations have agreed shall be binding on one

another as International Law." A higher authority for a legal definition could not easily be found, not only because of the eminent judicial position of the author, but because of his cultured abilities, his large experience and known keenness of analysis. If we must abide by any one attempt at definition, we might, out of respect for the great jurist who honored us with his presence a few months ago, accept this formula. It is at least free from affectations of speech; it does not offend by any effort to cover up faults of substance with ambition of language. And yet, if it be not improper here to suggest a doubt as to the practical aid thus given us, we might well ask ourselves if, owing to the inherent difficulty of the task, this eminent jurist has not failed to simplify the subject to any appreciable extent.

"What civilized nations have agreed shall be binding on one another," is International Law. This seems so obvious that criticism blushes at fault-finding as though it were caught *flagrante delicto* in the commission of some moral wrong. But the very words used are big with potential deception. Who shall say whether any given nation deserves to be called a "civilized" nation? The line of demarcation may be as difficult to draw as it is in private life to draw the boundary between a gentleman and one who is not a gentleman, a wise man and a fool, a scholar and an ignoramus. The extremes in each class are easily recognized and classed. But the sinner may in a moment of inspiration rise to the heights of the saint: what label shall we in general terms affix to his character? George IV. was the "first gentleman of Europe;" shall we accept him as a type like Sidney and Bayard? Benedict Arnold lives embalmed in the contempt of a great nation because of the one act that sullied a brilliant life, but another great nation received him with open arms, allotted him an honorable livery, and treated or affected to treat him as a patriot and a hero! Whose standard was right, whose was wrong?

Probably the "civilized nations" will none of them accept Turkey as one of their guild; nay, they all treat her, by reason of this excommunication, as they will, simply because

they are not dealing with one another. It would, indeed, be a one-sided contract if Great Britain or France, confessedly civilized, should feel bound to treat the Turk as though he were a Christian, while he recognized no authority, and bound himself to no rules of good behavior. And yet, if there be a moral sanction in these rules, how can they be taken up or laid aside according to the station of the party whose rights are involved? But the difficulty extends much further. Granting that the definition does not prevent the abrogation or expulsion of Turkey, nor the arbitrary and violent seizure of African territory, who shall say when a nation is so civilized as to come clearly within the definition? Shall she herself have a voice in the matter? If her ports are about to be bombarded or her territory torn from her by violence, may she say, "Stop, I am civilized, and the rules do not permit you to treat me in this brutal manner." Or may the unquestionably civilized power justly assume the judgment seat, and retort, "No, you are not civilized, you have no *habeas corpus*, no trial by jury, no liberty of the press. You do not belong to our privileged brotherhood of states; *ergo*, you shall be taught reason at the cannon's mouth." It is much to be feared that unless the Balance of Power, a Big Brother, or some other *Deus ex machina* should appear on the stage, the bombardment would have to go on, the Rules being suspended.

Nor is this all. The Rules, it is said, are binding on the civilized nations who have agreed to be bound. But what becomes of the civilized nations that have not agreed, because they came into the world as Governments too late, or ripened into salutary civilization so recently that they have not had an opportunity to recognize the binding force of the Rules? This Republic, for instance, while generally recognized as one of the civilized nations, even if peradventure given to over-freedom of speech, dissents from some of the Rules—those on Privateering, for instance. What is her status under the Rules? How far do they apply to her? Rules of International Law, if they mean anything, are intended to promote the interests of the nations that recognize them, to the extent

of giving them a just equivalent for what they concede to one another. But the United States as a nation, by its extent, its resources, the nature of its government, its remoteness from European communities, its natural sympathies for weaker neighbors, must necessarily take a different view of many subjects from others in the civilized combination. Shall she be voiceless when right and justice according to her standpoint are violated under the generally accepted rules? Or may it not be fairly claimed that so important a factor in the society of nations shall have its influence and be recognized, even if old ideas must be modified, ignored, or set aside?

Much of the misconception on this subject arises, as is often the case, from a confusion in terms. Not only is there no International Law in the true sense of the expression, but the expression itself is misleading. The *Jus Gentium* is the *right* of nations, or as it is termed in the Continental Books *le droit des gens*. As individuals may be said to possess rights inherent and inalienable—at least our great Declaration so states as a proposition beyond dispute,—so it may be said that each nation has the right to preserve and defend its existence, to assert and maintain its independence. Certainly in theory this may not be gainsaid. From this *right* must of necessity arise and grow corresponding duties on the part of others. To what limit this right may be extended, how far it may be circumscribed, to what extent the “pursuit of happiness” may justify expansion, how far the right of self-defense may interdict its indulgence, these are the problems involved. No great nation has ever hesitated to pursue her own advancement where it could be done without danger and without shocking the public opinion of civilized mankind. But great and powerful nations have learned by experience that self-denial might be more profitable than the application of brute force, provided a like restraint was observed by their neighbors. International Law, if there be any, is the law of enlightened self-interest, guided by prudence, and by the consciousness that peace has marked advantages to recommend its preservation. It is a curb upon rashness, a moral adviser against brutal measures, a reminder that the fortunes of war

are uncertain. The great purpose of and incentive to a system of intercourse based upon mutual respect for public rights is the approximation among nations to the methods generally accepted among men in their individual capacity. That is to say, the Governments of to-day are willing, as a general proposition, to recognize the existence in times of peace, of ethical rules which it is to the general advantage that all should obey. And as no ethical system devised by the wit of man has ever approached in beauty and perfection the Christian religion, the principles of the faith have been accepted, with limitations of place and circumstance, as the ground work of international rights and duties.

Evidently it is no easy task to define such a system or science as this. It is easier to state what it is not than what it is. It certainly is *not* a system of law, if any known definition of law has preserved its value. No rule of action may properly be termed a law, which has no sanction. A rule to be efficacious must be imposed by a superior upon an inferior : there must be the fear of punishment attached to its violation or the hope of reward must encourage obedience to its mandates. When we speak of the Divine Law, the Federal Law, the State Law, we use words which present an intelligible idea. Even if we speak of the Law of Nature we are within the truth, for nature punishes the transgression of her edicts with unfailing severity. But International Law is different from all these, and can no more restrain the anger of an aroused people, than King Canute on his throne could drive back the waves that took no heed of his royal commands.

If, then, I have ventured to criticize the language of the eminent Justice in his attempt to formulate his own idea of International Law, it is not from any doubt that it was as accurate as the nature of the case allowed, but simply because it is not, or at least has not yet been possible to define International Law on the theory that it is a law at all.

Under these circumstances it should be obvious that I cannot undertake with any confidence the task which so many have attempted without absolute success. I would venture, however, to describe my own imperfect conception of what is

termed International Law, by saying that it is the result of an implied agreement among civilized nations to abide by those practices which have proved most conducive to the promotion of profitable intercourse in peace, and to the mitigation of suffering and hardship in war. I hope that I am not overrating my own powers of critical analysis when I add to this the confident assurance that I could detect many flaws in this rather clumsy definition had it been presented by any other person than myself. Possibly even this circumstance may not be absolutely prohibitory, when time and reflection have suggested needed improvements.

How far the Christian religion has contributed to the formation of the *Jus or Right of Nations* may not be easy to determine, but it does nevertheless seem clear that no such system could have existed when Rome was mistress of the world, or could exist to-day but for the lofty principles inculcated by that form of religious belief. It is an offshoot of the teaching that men are brothers even when they live on the opposite banks of a river, even when they speak a different language, even when they present wide divergences of morals, tastes, habits and customs. If men acting in their political capacity were governed by the same rules and principles as they are in private lives, Christian ethics might be a much more potent factor in the adjustment of international relations. But unfortunately America is not the only country where public men claim the right to own two consciences, one for the guidance of their public, another for the direction of their private life. Great ministers and kings have deemed it lawful to deceive, cheat, despoil and destroy their neighbors with such happy results that to say, "Honesty is the best policy" in the public conduct of nations would betray ignorance or suggest sarcasm. Probably no great power in Europe may boast that its record is entirely free from blemish. After the treaty of Berlin a few years ago, the French Ambassador returned home with the boast that France had kept her hands clean, which was certainly true if cleanliness and emptiness had been inter-convertible terms. But it is no imputation upon her citizens to add that they might have preferred some substantial evidence of

practical diplomacy, an island in the Mediterranean for instance, even if the perfect purity of her motives and conduct had been thereby made less apparent. We ourselves boast, justly I think, that our conduct of public affairs has been on the whole conspicuously free from reproach. Yet this is what one of our reliable historians, an American of Americans, has to say : "In the end far more than one-half the territory of the United States was the spoil of the Spanish Empire, rarely acquired with perfect propriety. To sum up the story in a single word : Spain had immense influence over the United States, but it was the influence of the whale over its captors, the charge of a huge, helpless and profitable nation." Adams, V. 1, p. 343.

It may be interesting here to note that the attempt was made during the present century to subject international relations to the exalted precepts of the Gospel. Alexander the Emperor of Russia, after Waterloo and the resulting restoration of Louis XVIII., seems to have been deeply affected by his and his allies' triumph over the giant whom they had overthrown. He determined that, so far as lay in his power, he would see to it that the world should be governed by Christian principles, and carrying his theories into practice he proceeded to convert the King of Prussia and the Emperor of Austria to his own way of thinking. Poland was not represented in these royal and imperial conclaves, except by those who had themselves partitioned her. A league was formed by which three mighty sovereigns agreed to consider themselves as members of one great Christian family ; their real and sole Sovereign was Almighty God, whose delegates they declared themselves to be. Thenceforth, they would tend their respective flocks according to the word of God. Naturally, there could be but one appropriate title applied to this association, and it was accordingly known as the Holy Alliance. England refused to enter into this impressive and picturesque concert of Potentates, her representative (Lord Castlereagh) having written that the Emperor Alexander was out of his mind, but others gave their assent to the initiation of Christian politics, and the Law of Charity was thenceforth to rule the world.

But the effervescence which prompted this fine innovation

was soon over. Napoleon was chained to his weather-beaten rock, and it was not likely that he would ever be released except by Death, a contingency to which none of the parties to the new dispensation objected, as he would then no longer be dangerous. Security of tenure is a conservative adviser. When the recently shaken thrones had been repaired, and their owners became firmly seated, it was evident that the pestilence of liberal ideas must not be permitted to spread. The Divine Power of Kings and Emperors was so valuable to the world that it should not suffer jeopardy at the hands of turbulent people who wanted the liberty to speak, to write, to think, to come and to go at their own will. Reaction must be put down by the royal and united brethren, and it would have been put down and stifled even in America, but for the timely declaration made, in apt terms, by President Monroe to Congress in 1823. In Europe the Alliance succeeded in its efforts to suppress the clamor of the people, and for some years to come the great Monarchs could contemplate with satisfaction the fruits of their common efforts. The Holy Alliance became, in Mr. MacMaster's language, a mutual association to show that Diplomacy was less selfish or Kings less ambitious, or International Law more certain or more efficient than before the Articles had been signed.

Their failure to improve the moral character of international relations should not be deemed of any significance except to show that spasmodic attempts, born of temporary excitement and peculiar surroundings, accomplish but little, in the long run, for the improvement of mankind. Self-interest, self-preservation, and a prudent apprehension of disastrous changes are not the only factors in the solution of weighty problems. They may, in a measure, be productive of good results where wholesome fear acts in the direction of self-restraint. It is manifest that if all the crowned heads of Europe had, at that time, agreed to administer the weighty matters entrusted to their hands on general principles of enlightened Christian ethics, and had respected the obligation of their mutual bond, the world would have been better and wiser and happier. And so would society be better and happier if all the members

joined together in a solemn league to obey the Decalogue and live up to the sublime heights of the Sermon on the Mount. But the practical difficulty would probably arise out of the failure of men to overcome the laws of nature which prompt them to violate the moral laws, notwithstanding their promises of amendment. Fortunately, Courts and Officers of the Law are present to supplement the imperfect execution of excellent intentions where individuals are concerned, but this important element is lacking where Royal heads find mischief for Royal hands to do. So the Emperors and Kings of the Holy Alliance might adopt noble maxims of conduct, with excellent intentions, and fail to carry them out with equally excellent intentions ; they were the Lords of the occasion, the Masters of the situation, and, worse than all, the sole interpreters of the Rules which they professed to follow. It is hardly necessary to say that conscientious men have committed atrocious acts with unimpeachable motives, and have found in the sublime precepts of religious faith apologies for measures which are written in crimson on the pages of History. It is not enough then to find the Masters of the World setting out to reform international relations according to the most approved rules. Certain plants, and those the most enduring, are of slow growth. They thrive on the summer rains and the summer heat, but they grow strong and enduring only when they are able to stand the test of storms and cold. No law, no system of laws, no scheme of universal political ethics, may live unless it be ratified by experiment and approved by lapse of time. The confidence of the World is not easily won. The People are not easily charmed by sweet promises and dulcet protestations. They realize that the popular view is not always the kingly or imperial view, and if they never knew it until the Holy Alliance undertook to consecrate the Divine authority of Rulers, and to put down by force the aspirations of the masses, they then learned that different points of view often lead to opposite results. They may well prefer slower international processes to sentimental protocols, and ask, with Anglo-Saxon directness, whether the innovations are likely to pay. Not a picturesque view indeed, but

one that saves trouble in the end by forestalling rash experiments.

It may in truth be said that International Law has grown, and is likely to develop much as the Constitution of Great Britain and the Constitution of the United States. These differ, I need hardly state, in the important particular that the one is written, and the other exists only by tradition. But the difference is less in substance than in name, for the stubborn conservatism of the English race and their strong love for precedent make that stable and enduring, which would be evanescent and temporary with a differently constituted people. Our Constitution, on the other hand, left the framers' hands, in outward form, a skeleton, which it became the duty, most admirably discharged, of the Supreme Court, to clothe with flesh, to inspire with life, and to endow with motion. Its written formulation is but a brief declaration of principles to which Legislation must conform, but which, with its marvellous terseness and pliability remains in unfettered activity ready to expand as the necessities of a growing nation demand. In this do these Constitutions differ from the hand-made products of Continental Europe. The written schemes of Sieyès, for instance, were ingenious in the extreme, and were written in a few hours ; they lacked but one thing, they would not work in practice. The different parts of the beautiful mosaic fitted each other with artistic exactness, but alas ! like a toy boat on a real ocean, they went to pieces as soon as they were tried for the business of a great people's political life. So must it be with International Law. It is in no man's—no nation's—power, to make it or add to it without the acceptance of general civilized opinion, and it cannot be so accepted until time and experience have demonstrated its fitness. That additions must, from time to time, be made to any international device cannot be disputed without condemning the actual system to death by anæmia. If the world moves, any method or scheme of adjusting the relations of its component parts cannot remain motionless, especially when young and vigorous nations are added to the family, and by their restless activity disturb the old conditions of paralyzed

equilibrium. Our own country demands recognition by her commanding position as Queen of the Western World. She does not require the exchange of courteous protocols to assure her of that recognition. It is said of General Bonaparte that a Treaty of Peace was presented to him after one of his dazzling Italian campaigns, in which proposed Treaty was an express recognition of the existence of the French Republic. He struck out these words, because, as he said, the French Republic, like the sun, needed no such acknowledgment; she was like the sun, visible to all mankind. The Republic of which we are citizens does not need to be told what she is, nor what her rank, nor how far her fiat is the law of two continents. She cannot be ignored, nor her legitimate influence minimized. It is not too much to say that no revision of ancient rules devised by Grotius and Puffendorff and Vattel will be complete without amendments and additions from her. To ask nothing that is not right, to submit to nothing that is wrong, was always a rule of our Government, and is to-day. We shall be wise and remain strong if we adhere to it. In the catechisms of Napoleon's day, the children were required to give special thanks, because the Almighty in his mercy had vouchsafed so excellent a Ruler to France. Let us hope that, as years roll on, the World shall become so much happier and better because of our being part of it, that other nations may, with grateful hearts, bless the Providence which inspired the Fathers with wisdom to lay the corner-stone so well. It only remains for the children to love the work thus begun with earnestness enough to preserve and protect it against enemies from without, and the more dangerous foes within. Then shall our mission be in the way of glorious accomplishment.

International Law, if it is to keep step with the progress of mankind must take into account the fact that the balance of power has passed from the Throne to the People. Whether for good or for evil, the Royal or Imperial Crown with scarce an exception, is held by gift. We see, at times, glimpses of mediæval reverence for the great office of Ruler over a nation, and the Ruler himself sometimes astonishes or amuses

the world by mediæval claims to a Heaven-bestowed dignity. But the Gracious Queen, who has so worthily and so long held the sceptre of Great Britain, claims no title to her dignities and her palaces, outside the laws of the land. No one fact in modern history shows more strikingly the changes wrought by time than the fact that the successor of Queen Elizabeth is Queen by virtue of an Act of Parliament, which may be unmade as it was made, while across the channel the palaces of Louis XIV. are occupied by a reputable gentleman, recently engaged in business, who, for a brief term of seven years, executes the bidding of a plebeian Legislature. When we recall the fashion in which the Virgin Queen and le Grand Monarque treated the law makers of their day, we need no other reminder of the radical changes that have marked the transfer of power from the King to the People.

Obviously such vital differences in political conditions the world over, must have their influence on International Law. The moulding of the system has passed into other and possibly ruder hands. The niceties of Diplomacy have assumed another shape, or more properly have disappeared with the elegant forms that accompanied and made part of them. Directness of speech, open explanation, frank statement of what is denied or objected to, are becoming part of the International Law or at least of International Procedure. We, of America, have done our international business without the intervention of professional go-betweens, and we have not thus far had cause to complain that we had no experienced Diplomatists to embarrass our relations with foreign powers by their ponderous and dilatory methods. The secrecy of the old style cannot exist when the Press is free. We cannot well imagine the King of one nation subsidizing the King of another for any length of time without a publication of the fact with its necessary consequence of putting an end to the relation of Master and Servant. Yet Charles II. was the recipient of a salary in French gold, which he spent with royal profusion in every way, except in the way of benefitting his people. This fashion of regulating foreign relations and of settling international differences may be said to have disappeared.

That the gross form of bribery here alluded to was exceptional, may be granted, but it cannot be denied that the personal relations of sovereigns had much to do with the intercourse between nations, and to that extent affected International Law. The situation of a whole people might be changed and often was changed by a marriage. The Kingdom of France really became such by happy alliances adding Duchies of vast extent to the Central Power, with as little ceremony as a neighbor's farm is annexed with its chattels to the lands of an owner who desires territorial expansion. France virtually annexed Spain when the King's son Philip ascended the Spanish throne. But a war of gigantic destruction followed the mere suggestion made in our day, that a German Prince might take the place which Philip once filled. It is true that the suggestion was afterwards withdrawn, and the wrong of initiating a war without necessity was imputed to France. Yet it cannot fairly be doubted that if the attempt had been made to place this German Prince at the head of the Spanish nation, the principles of International Law, as generally accepted and understood, would have been violated. For, if there be one principle which stands out to give the appearance of substance to this vague and shadowy law, it is that the Equilibrium of Power must not be disturbed. This may be said to be the *fons et origo* of the whole plan. The religious observance of the rule is indispensable. *Noli me tangere* is the golden maxim, which permeates and gives life to it and general acceptance. A maxim, too, that is not confined to the narrow limits of an actual injury, a direct assault, but with the elastic force of every great principle insists upon investigating remote and apparently unimportant facts. And it is, indeed, vital, for its acknowledgment alone preserves the peace of the world. How long, think you, would Holland retain her independence but for this? She is filled, it is true, with a brave and patriotic people, but the German Uhlan would water his horses in the picturesque canals of the Hague, and the Watch on the Rhine would be sung in that ancient city's cafés long before the dykes were opened to drown the irresistible foe; how long would Belgium retain her autonomy

and flourish in art and wealth and a prosperity all her own, if the tempting prey were opened to the neighbors who, in the past, made her a part of the French nation. But to touch Holland, or Belgium, or Switzerland is to disturb the equipoise, and an attack upon either would be resented as swiftly in London, as though a French or German fleet were threatening the coast of England.

All which amounts to no more than saying that self-protection and self-preservation constitute the corner-stone of modern International Law. This instinct is as strong in communities as in individuals, and will, when aroused by real or imaginary perils, sweep away forms and law as worthless encumbrances if they interfere with their first duty and most valuable right, the duty to resist aggression and the right to live.

Utility is the chief ligament that binds together into something like systematic arrangement the provisions of International Law. In the complicated European affairs of to-day, with nations closely approximating each other in financial resources and, therefore, in military power, some concession by each to the other must be made in the form of self-denial. To live in the family of civilized nations, no power shall appropriate the territory of a weaker neighbor without the permission of the other parties in interest. This permission may be obtained by a successful war as was done until and including Napoleon's time. But he closed the era of the great Conquerors who dispensed, in hurry of an agitated career, with the usual forms of international courtesy. It is not likely that until the present system is radically changed, a victorious Emperor or King will tear down, build, remodel, patch up, or create thrones as the requirements of his policy or the importunities of his relatives might require. "The House of Braganza has ceased to exist," was all the notice that he deemed it necessary to serve on the parties interested, or on the world in general, when it suited him to abolish that ancient family; nor, is it probable that any other Military Genius will carry on war at the cost of others, and reduce home expenses by levying contributions far in excess of the

actual and necessary disbursements to which he had been put. International Law has, at least, benefitted the world in this, that the moral sentiment of mankind finds an expression in the practices which civilized nations have sought to establish among themselves for their mutual guidance and mutual interest.

It is now chiefly by treaty that accessions of territory are had. The advantages of such treaties as those which followed the downfall of Napoleon are manifest. They consecrated a distribution which silenced opposition by its generous equity. That generosity was exercised at the expense of others than the contracting parties ; but the equilibrium that had been so unduly disturbed must be restored, and it was done probably with as little harm to the smaller factors in the problem as was consistent with its solution.

Returning for a moment to the beginnings of International Law, we find that Self-Preservation and Utility are at its source. Indeed they constitute its *raison d' être*. For while we may say that it is the preserver of peace, and the refuge of the weak, the same story is told under a changed name. The strength of the weak lies in the jealousies of the strong, and the preservation of Peace in the greater benefits that nations can reap from the quiet pursuits of commerce and agriculture. A proper apprehension of the advantages which nations derive from a husbanding of their resources, and an economy of men and treasure, does more for the happiness of the world than the most voluminous treatise on the Rights of War and Peace. An intelligent book on Political Economy is really a demonstration of War's futility. The value of a human life may be computed in money, and shake the purpose of the Potentate who meditates a war. It is not only of the Royal head of the animal kingdom that we may say, "A living lion is worth two dead." It is true of human beings as well. The would-be Conqueror may not be deterred by humanitarian pleas, nor hesitate because of brave men's blood and women's tears, both shed for his caprice. And yet he may hesitate at the cost of an unarmed man if he computes the value of the man as well as the cost of the accoutrement.

Nor can it be fairly gainsaid that with our progressive civilization, which means the more general diffusion of education, a broader, finer, stronger moral sense has grown up among the nations. It shows itself in many ways, and breathes its purifying spirit into the dry tomes of the International Law writers. War has lost some of its horrors because humanity protects the wounded prisoner and cares for him as though he were a forgiven foe or a recovered brother. Human slavery is dying out, and the traffic has become almost a record of the past. Unprovoked attack upon a weaker enemy is less frequent than of old, not only because of the danger of arousing defenders for the weak, but because of a decent regard for the opinions of mankind. One short century has wrought a change in these respects that almost staggers belief. The shocking absence of humanity that once characterized the conduct of refined nations seems inconsistent with anything but barbarian depravity. And we may, perhaps, venture the boast that at no time has the intercourse between members of the human family been so near the Christian ideal, far removed though it still be from its moral beauty, as it has been since the People have been the predominant element in the conduct of the world's business. The heart of the People beats with more generous pulsations than that of the artificial society which acquired and so long kept control of human actions. Torture was never the People's instrument of justice, although it was the Kingly implement: cruel and unusual punishments disappeared from the statute books as soon as the People's strong hand wrote the laws. War became humanized, so far as its inherent brutality permits, as soon as the People became the Masters. For it was of old the People who suffered the torture, fought the battles, paid the taxes, and bore the burden of the day and the heat. Small wonder if they have learned that they could improve upon the old devices when the class that made the harsh laws and imposed the heavy burdens never felt the edge of the law nor the weight of the burden.

With the People's reign new ideas have come to the front, and old ideas have gone to the rear. True, Bipartite, Tripartite, and Quadrilateral treaties and alliances may still be made,,

and the People may not be told to what they have been committed, but even in those countries where such contracts are made, it is not quite certain that when the decisive moment comes, the masses may be moved with sheep-like docility. Then, too, a new and disturbing element has entered the fold, a young, restless, growing nation, impatient of forms, a lover of action, a partisan of Justice. If left alone one People will not hate another People. The resentments of Monarchs are not always echoed in the hearts of their subjects. Our United States has given a practical example of what may be done for Peace by a nation that is able to be strong in war, for we have an International Law binding forty-five States together under a written treaty. Our differences are settled by a Tribunal of Arbitration that deals with the Communities as freely as it would deal with the individuals that compose it. An experiment was once made outside the jurisdiction of this Tribunal only a generation ago, and a great lesson learned.

That there may be grave peril in a situation which gives free scope to the generous impulses of a strong nation cannot reasonably be denied. Impulse, even when directed to a noble purpose, is often the enemy of Right Reason, and defeats its ends. It is in the nature of things that a story of wrong, persistent and unredressed, should rouse our people to wrath and tempt them to chivalrous, even if imprudent action. A great Republic, unembarrassed by the barnacle growth of ages, lightly equipped, because free from oppressive debt, earnest for liberty and hating oppression, is prone to generous folly that makes the Old World stand aghast. The cries of our neighbors are quickly caught up by ready ears. Differences of race are soon forgotten when our sympathies are plausibly invoked. We are, perhaps, too ready to love our neighbor as ourselves. A noble maxim in private life and one which no doubt should find an honorable place in the International Horn-Book. For International Law is based on, made up of, and permeated with Moral Law. It is nothing, if not moral.

The eminent Chief Justice of England says that "The ultimate aim in the actions of men and of communities ought to conform to the divine precept—'Do unto others as you

would that others should do unto you.' " An exalted, but, perhaps, not wholly safe guide in the intricate labyrinth of international relations. While such a precept if followed by individuals would raise society to a plane that it has never yet attained; while it may be followed by all who understand it to be the essence of the precept of Charity, the application of the Golden Rule in the larger matters of the world might be destructive of all pretence of international law. Unrestrained emotion, however generous, might and would be indulged in at the expense of nearly every rule that Jurists have taught from Grotius and Puffendorff to Story and Wheaton. Law, every law, means restraint and involves self-denial. When these States were Colonies in rebellion, they longed for, sought and obtained foreign intervention. Does it follow that the mature nation shall do to others what it then desired others to do for it? The point of view of contending nations is naturally different. If to-day a foreign Power seeks by force to retain in subjection its reluctant Colonies how shall the Golden Rule be applied? Which of the contestants shall receive the benefit of its application in the form, not only of sympathy but of moral and physical support? We have been at one time the rebellious Colonies, at another the power that undertook to reduce its rebels to submission. In the one case the Golden Rule meant, "Help those who struggle for freedom;" in another, "Hands off!" Non-intervention in the affairs of other communities is one of the few principles that are generally recognized as essential to the peace of nations, and yet it is hard to keep the blood of a free and magnanimous people from tingling and rushing to fever heat when the cries of a despairing neighbor rise in protest against oppression. Yet our Washington, with prophetic vision of the dangers lying in wait for his countrymen, warned them against listening to the voice of natural and brotherly sympathy. What, then, becomes of the Golden Rule, if it is circumscribed by expediency, fettered by law, and condemned in practice by "those rules to which nations have agreed to conform in their conduct toward one another?"

This apparently pessimistic view of the applicability of

moral precepts to the regulation of international affairs only serves to prove that the element of Law enters but inadequately into the system that we are considering. Where the municipal law is concerned no such confusion and difficulty arise, for the statutes interfere to prevent the over-zealous moralist from indulging, to the detriment of others, in his desire to promote the welfare of his neighbors. He may give his fortune and his time or his life to the improvement of his brethren, but even Philanthropy has its legal limitations. The best, the most exalted motives will not give immunity to the violation of a statute. The wings of Charity are often clipped by the shears of cold-blooded legislation. Wrongs often go unredressed because a Christian Quixote may not do to his noisy or peace disturbing neighbor what his own construction of the Golden Rule would suggest as most expedient.

It may appear from what precedes that the sanctions of International Law are at least imperfect and insufficient, if they exist at all. It may be accepted as a fact, not encouraging perhaps to the student, that the system is only an approach to a system, the Law only an approximation to a Law, the Rules no more than abstract precepts which may be violated with impunity, because there is no Tribunal vested with the power to restrain or to punish the violator. But imperfect as the device may be, it deserves careful consideration. Its aim is high and its purpose beneficent. It is of some avail *parcere subjectis*, though it has never yet been efficient *debellare superbos*. It is in effect an attempt of Christian civilization to propose humane rules for the international regulation of the affairs of the several nations. It has not yet taught forbearance to the mighty, nor given assurance of Justice to the weak, but it has striven to do both, and in some measure it has succeeded. It has not abrogated war, but has taught the value of charity, even when the laws were silent. It has not abolished human slavery, but it has brought nations to a common understanding that the traffic in human beings should be in the common interest of their self-respect, crippled if not destroyed. It has founded no Tribunal, but has developed a monitor,—Public

Opinion,—which may remonstrate and denounce in a voice that goes around the world. And finally, when clouds of dissension arise upon the horizon, it teaches, by its very misnomer, that there is a class of men who may be trusted to solve weighty problems more safely and less expensively than those who rely upon force to persuade, and gunpowder to convince. The Lawyer,—or as he is finely called when his client is a nation,—the Jurist, at the opportune moment, steps upon the scene, and the halting march of Progress is resumed, the wheels of commerce continue to revolve, Protocols take the place of Declarations, Pleadings of Bulletins, and legal opinions of Proclamations. No ghastly list of dead and wounded sickens the homes of the contestants. When the fight is over, no healing processes of Time and Taxation are needed to repair the waste, for Reason has had the last word and has reached a result quite as certain to be just, as though the debate had been fought out at Waterloo, Gettysburg or Sedan. If this be one of the fruits of this so-called Science, it is indeed a blessed Science that deserves to live forever.

*Frederic R. Coudert.*

June 7, 1897.